A motion by Tennessee and South Dakota to adopt a rule relating to the Definition of Sales Price

Rule 327.7 Sales Price Definition

A. The purpose of this section of the sales price definition rule is to clarify which taxes a member states shall include in or exclude from the sales price as defined in Appendix C, Library of Definitions.

1. Sales price is the measure that is subject to sales and use tax. Regardless of where the legal incidence of tax falls, the sales and use taxes covered by the Agreement that are applied to the sales price of the retail sale of a product are not included in the sales price of that product.

2. "All taxes" or "Any taxes" as used in the sales price definition include any tax, impost, levy, fee, duty or similar government imposition that is imposed by any level of government.

3. A tax imposed at a time prior to the point of a retail sale is an element of the cost to the seller of the property or service sold and shall be included in the sales price (measure) for purposes of calculating the sales and use tax by member states.

> Example 1: Federal excise tax imposed on the sale by a manufacturer, producer or importer of tires to resellers. 26 U.S.C. § 4071. The federal excise tax is imposed on the manufacturer, producer or importer and constitutes an element of cost of its tires that is passed down to the retailer and ultimately to the consumer in the selling price. This tax is included in the sales price of the tires.
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> Example 2: When determining the products' prices, all business costs are considered. A portion of a price may reflect costs of shelving and equipment and the taxes paid on those purchases. Because those expenses and taxes were imposed prior to the retail sale, they are included in the sales price.

4. The total amount of consideration without deduction for any costs or expenses of the seller is included in the sales price. While provisions in the definition identifying the amounts that may not be deducted from the sales price are very broad, the exclusions from sales price are narrow and specific.

The sales price definition states there is no deduction from the sales price for "The cost of materials used, labor or service cost, interest, losses, all costs of transportation to the seller, all taxes imposed on the seller, and any other expense of the seller."

However, a state may elect to exclude state and local taxes on retail sales that are otherwise imposed on the seller and included as a cost or expense in sales price when statutes authorize the seller may but is not required to pass on or to collect such tax from the consumer. This election applies only to such taxes that are separately stated on the invoice, billing, or similar document given to the purchaser.

A state making this election may not select individual taxes to include or exclude from the sales price. This election is to apply to all similarly situated state and local taxes imposed on the seller that the statute authorizes the seller may but is not required to pass on or to collect such tax from the consumer.

5. The sales price definition also states that "sales price" shall not include "Any taxes legally imposed directly on the consumer that are separately stated on the invoice, bill of sale or similar document given to the purchaser." A tax imposed on the consumer that is not separately stated on the invoice, bill of sale or similar document given to the consumer is a cost or expense of the seller and is included in the sales price.

A tax is legally imposed directly on the consumer if the imposition statute specifies the tax is imposed on the consumer or the seller is required to collect from or bill the consumer, or the tax is to be paid by or is due by the consumer.

Such tax shall be considered a tax imposed on the consumer regardless whether the statute provides that the seller is liable for the tax if the consumer does not pay the tax to the seller.

A tax that does not meet the criteria as a tax imposed on the consumer as defined in this rule is a tax imposed on the seller or an expense of the seller.

> Example 1: Federal Excise Tax on indoor tanning services. Chapter 49, Section 5000B, states the tax "imposed by this section shall be paid by the individual on whom the service is performed". This tax is imposed directly on the consumer and when itemized on the invoice the tax is not included in the sales price.
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> Example 2: A municipality in State A imposes a 3% tax based on the retail sale of lodging services. The statutes in State A provide that the seller may collect this tax from the consumer and if the seller collects this tax from the consumer, it must be separately stated on the invoice the seller provides to the consumer. This tax is imposed on the seller and is included in the sales price. Such tax is excluded from sales price only in states electing the option available under definition and subsection A.4. of this rule.

6. State law that allows the local jurisdictions to impose a tax will be used to determine if the tax is imposed on the consumer, regardless of how the jurisdictions write their ordinances. The state law may contain language or may state the jurisdictions may include language stating the tax is imposed on the consumer, the tax must be collected from or billed to the consumer, or the tax may be collected from the consumer. If the state law does not address the collection or imposition of tax, the tax is considered imposed on the seller.

> Example 1: State Law 1. Additional municipal non-ad valorem tax authorized--Rate. Any municipality may impose an additional municipal non-ad valorem tax at the rate of one percent upon the gross receipts of all leases or rentals of hotel, motel, campsites, or other lodging accommodations within the municipality for periods of less than twenty-eight consecutive days. Any person or retailer subject to taxation under this chapter may add the tax under this chapter, or the average equivalent thereof, to his price or charge.
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> Based on State Law 1. this tax is imposed on the seller. It is excluded from sales price only in states electing the option available under definition and subsection A.4. of this rule.
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> Example 2: State Law 2. The council shall have power to tax for revenue, license, and regulate pawnbrokers, peddlers, auctioneers, brokers, hawkers, commission merchants, showmen, jugglers, innkeepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express companies and vendors of patents. Such tax may include both a tax for revenue and license. The city council shall have power to raise revenue by levying and collecting a tax on any occupation or business within the limits of the city and regulate the same by ordinance. All such taxes shall be uniform in respect to the class upon which they are imposed. It shall be the duty of the city clerk to deliver to the city treasurer the certified copy of the ordinance levying such tax, and the city clerk shall append thereto a warrant requiring the city treasurer to collect such tax.
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> Based on State Law 2. this tax is imposed on the seller and is included in the sales price.

7. Contracts between a seller and consumer will not alter upon whom the legal incidence of the tax is statutorily imposed.

8. Examples of Federal taxes that are imposed on the consumer based on the above rules and are excluded from the "sales price" when separately stated on the invoice, bill of sale, or other similar document given by the seller to the consumer are:

A. Telecommunications Excise Tax. 26 U.S.C. § 4251.
B. Transportation of Persons by Air. 26 U.S.C. § 4261.
C. Transportation of Property by Air. 26 U.S.C. § 4271.
D. Tanning Service. H.R. 3590, § 10907 Chapter 49, § 5000B.

B. Partial exclusion of a definition is prohibited. A member state that has adopted the "Sales Price" definition shall use the definition contained in the Streamlined Sales and Use Tax Agreement and shall not exclude from the sales price any amount or measure that is included in the sales price definition unless the Streamlined Sales and Use Tax Agreement specifically permits such a variation.

Example 1: A state imposes an excise tax on the receipts from wireless telecommunication services. The law does not state the consumer is to pay the tax or that the seller is required to collect the tax from the consumer. The law is silent concerning an authorization to pass the tax on to or collect the tax from the consumer. The state may not pass a sales tax statute to exempt the excise tax on wireless telecommunication services from the sales price.

Example 2: A state law allows municipalities to enact an ordinance or resolution imposing a tax on the privilege of furnishing, at retail, rooms or lodging to transients by hotelkeepers, motel operators and other persons furnishing accommodations that are available to the public. The state law states the tax imposed under this rule is not subject to the sales tax imposed by their sales tax statutes. There is no language stating the tax must be collected from or paid by the consumer and no language providing the seller may pass the tax on or collect the tax from the consumer. The state law does not determine the imposition of this tax. The municipality's ordinance or resolution determines if the tax is imposed on the seller or the consumer. The state cannot exclude this tax from the sales price by stating the tax is not subject to sales tax.